

1 Spencer Kenner (SBN 148930)
James E. Mizell (SBN 232698)
2 Robin McGinnis (SBN 276400)
CALIFORNIA DEPARTMENT OF WATER RESOURCES
3 Office of the Chief Counsel
1416 Ninth Street, Room 1104
4 Sacramento, CA 95814
Telephone: (916) 653-5966
5 E-mail: james.mizell@water.ca.gov

6 Attorneys for California Department of Water Resources

7
8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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10 HEARING IN THE MATTER OF
11 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
12 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF
13 DIVERSION FOR CALIFORNIA WATER
FIX

**DEPARTMENT OF WATER
RESOURCES' RESPONSE TO SAVE
THE CALIFORNIA DELTA ALLIANCE,
ET AL.'S OBJECTIONS TO EVIDENCE
AND JOINDER**

14
15 California Department of Water Resources ("DWR") submits this response to the
16 objections to evidence submitted by Protestants Save the California Delta Alliance, et al.,
17 in the matter of DWR and U.S. Bureau of Reclamation's (collectively "Petitioners")
18 Request for a Change in Point of Diversion for California Water Fix.¹ Where applicable
19 in this response, DWR cites to the Master Response to Similar Objections Made by
20 Protestants Collectively ("Master Response") filed on July 20, 2016, which also provides
21 a common Statement of Facts and Evidentiary Standards for DWR's separate responses
22 to individual Protestants' objections.

23 ¹ Save the California Delta Alliance, et al. extensively joins, both in its objections as well as in a
24 separate pleading, in the objections filed by other protestants. These include the objections of protestants
25 Sacramento Valley Water Users, Local Agencies of the North Delta et al., Central Delta Water Agency, et
26 al., County of San Joaquin et al., Pacific Coast Federation of and Institute for Fisheries Research et al.,
27 City of Antioch, Contra Costa County and Fishermen's Associations, County of Solano, Natural Resources
28 Defense Council et al., the California Sportfishing Protection Alliance, the California Water Impact Network
and AquAlliance, Friends of the River, Sierra Club, and Planning and Conservation League and
Environmental Water Caucus et al. DWR's responses to these "incorporated" objections can be found in
the concurrently-filed specific responses to the objections filed by these individual protestants, which
responses are herein incorporated.

INTRODUCTION

1 Applying an incorrect evidentiary standard for admissibility, Protestants Save the
2 California Delta Alliance et al., sweepingly argue that the Recirculated Draft
3 Environmental Impact Report/Supplemental Draft Environmental Impact Study
4 (RDEIR/SDEIS) (SWRCB-3), the 2013 Draft Environmental Impact Report/
5 Environmental Impact Study (EIR/EIS) (SWRC-4), the 2013 Public Draft Bay Delta
6 Conservation Plan (SWRCB-5), all testimony that relies on these documents, and all
7 evidence based on the modeling done with the 2015 CALSIM version, including the Draft
8 Biological Assessment, should be excluded from the evidence in this proceeding. For
9 the reasons explained below, the objections should be overruled.
10

ARGUMENT

Protestants' Objections to Scientific or Technical Evidence Based on Purported Failure to Meet the "Kelly-Frye" Standard Are Without Merit.

13 Protestants Save the California Delta Alliance et al. incorrectly argue that, under
14 the Kelly-Frye standard for new or novel scientific techniques, the modeling programs
15 and analyses underlying the challenged specific documents (SWRCB-3, 4, 5) and
16 testimony is not admissible because the programs and analyses are not generally
17 accepted in the scientific community. Taking isolated statements from three comment
18 letters to different documents out of context, but with no reference to Petitioners'
19 testimony on modeling (DWR-066 and DWR-071), Save the California Delta Alliance
20 et al. attempt to argue that the modeling programs and techniques utilized have been
21 rejected by the wider "relevant" scientific community.²

22 This objection is addressed in DWR's Master Response, Section E, and
23 incorporated herein. As is explained in detail in the Master Response, not only is the
24 Kelly-Frye standard not applicable in Board Proceedings,³ but, even if applicable, the

25 ² It is, of course, debatable whether the opinions of these three referenced sources, the EPA, the
26 ISB or "Saracino and Mount et al." represent the relevant scientific community.

27 ³ See also the Board's March 18, 2016 Ruling on Motions filed in the enforcement proceedings
28 against Byron-Bethany Irrigation District and the West Side Irrigation District in which the Board explained the reasons why the Kelly-Frye standard does not fully translate to the administrative context, including proceedings before the Board.

1 modeling analyses and techniques utilized, CALSIM II and DSM2, are not new but long-
2 accepted and widely-used models, on which the Board itself has relied in reaching past
3 decisions. As to the 2015 CALSIM version, Save the California Delta Alliance et al.
4 provide no evidence that this version is not "accepted" by the scientific community but
5 only a conclusory statement that the model has not been "validated." Nowhere does
6 Save the California Delta Alliance et al. address Petitioners' testimony concerning the
7 2015 CALSIM version.

8 Further, the adequacy of the RDEIR/SDEIS (or the 2013 Draft EIR/EIS) under
9 CEQA, the point of most of the isolated statements cited as support from the EPA's and
10 ISB's comment letters, is not at issue here in the evidentiary hearing.⁴ (See Objections,
11 pp. 3:24-5:26.) For example, the brief, excerpted ISB passages complain about a lack of
12 comparisons, summaries, or graphics in the RDEIR/S. Moreover, Protestants also
13 mischaracterize the 2015 comments of the EPA to the RDEIR/SDEIS taking out of
14 context a routine rating of the EPA. The EPA did not reject the modeling programs and
15 analyses utilized in the RDEIR/SDEIS.

16 To the extent these limited excerpts do criticize the analyses of the BDCP, 2013
17 Draft EIR/EIS for the BDCP, the RDEIR/SDEIS, or the use of the 2015 CALSIM Version,
18 such critiques go to the weight of the evidence as opposed to its admissibility. Through
19 the procedures afforded by the evidentiary hearing, Save the California Delta Alliance
20 et al. have the opportunity to cross examine Petitioners' witnesses on the sufficiency of
21 the analyses, including the models and assumptions utilized and to provide rebuttal
22 testimony. It is within the expertise and purview of the Board to review the "scientific"
23 evidence submitted to determine whether such testimony is the sort of information on
24 which a reasonable person would rely and the proper weight to afford such evidence.
25 (Government Code § 11513.)

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27 ⁴ As Save the California Delta Alliance et al. correctly note in footnote 7 on page 6, the Board has
28 stated that it will not try Protestants' CEQA case.

CONCLUSION

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2 For the reasons stated above and in the incorporated Master Response, Save the
3 California Delta Alliance et al.'s objections to the admissibility of Petitioners "scientific
4 evidence" and the testimony that relies on such evidence are unfounded and should be
5 overruled.

6 Dated: July 22, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



Robin McGinnis
Office of the Chief Counsel

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